No.

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons For Granting the Writ:	8
I. It is essential to the proper administration of the mail pay provisions of Section 406 of the Federal Aviation Act, upon which the financial stability and operating efficiency of the air transportation industry is dependent, for this Court to determine whether, in a remanded mail rate proceeding, the Civil Aeronautics Board may, and must, retroactively revise that portion of a mail rate never challenged while it was in effect and upon which there was substantial reliance in vital financial transactions.	8
II. The Court of Appeals for the District of Columbia has misapplied the decision of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). That case, which enunciated the principle of administrative flexibility on remand, has never been cited in a remanded rate proceeding in the twenty years since it was decided, and most certainly has never controlled the disposition of a remanded rate proceeding under the specialized provisions of Section 406 of the Federal Aviation Act. The effect of doing so is to render unstable prior unchallenged rate determinations upon which there has been substantial reliance.	16

PAGE

III. The Civil Aeronautics Board held that it was compelled by *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 79 (1935) to make the retroactive rate revision. The court below, in direct conflict with the decisions of this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (1943) and 332 U. S. 194 (1947), declined to review Petitioner's challenge to this holding of the Board by inferring from the Board's opinion what the Board might do if it had not relied upon the *West Ohio Gas Co.* case. The court below further failed to find that the Board's application of the *West Ohio Gas Co.* case to a remanded rate proceeding conflicts with the holdings of this Court in *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219 (1947) and *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503 (1944). 21

IV. The Civil Aeronautics Board, in the remanded proceeding following *Delta Air Lines* v. *Summerfield*, 347 U. S. 74 (1954), did not comply with the decision of this Court when it readopted defective rate of return findings made prior to judicial review. 24

Conclusion 25

Appendix A 27

Appendix B 36

CITATIONS

CASES:

All American Aviation Inc., Mail Rate For Route No. 49, 4 C.A.B. 354 (1943) 13

American Airlines, Mail Rates, 3 C.A.B. 323 (1942) 11

PAGE

Arizona Grocery Co. v. Atchison T. and S. F. Ry. Co., 284 U.S. 370 (1932) 19
Braniff Airways Inc., Mail Rates, 18 C.A.B. 162 (1953) 13
Braniff Airways Inc., Mail Rates For Routes Nos. 9, 15 and 50, 3 C.A.B. 633 (1942) 13
Capital Airlines, Inc. v. Civil Aeronautics Board, 171 F. 2d 339 (D.C. Cir. 1948) 13
Chicago and Southern Air Lines, Inc., Latin American Mail Rates, 16 C.A.B. 536 (1952) 3
Chicago and Southern Air Lines, Inc., Mail Rates, 9 C.A.B. 786 (1948) 24
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 16
Interstate Commerce Commission v. Jersey City, 322 U.S. 503 (1944) 21, 23
Mid-Continent Airlines, Inc.—Mail Rates, 1 C.A.A. 45 (1939) 10
Mohawk Airlines, Inc., Mail Rates, Order No. E-13202, Nov. 26, 1958 15
National Airlines, Inc., Mail Rates, 9 C.A.B. 264 (1948) 12
National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219 (1947) 21, 23
Northwest Airlines, Inc., Trans-Pacific Mail Rates, 12 C.A.B. 256 (1950) 12
Pan American Airways Co. (Del.)—Transatlantic Mail Rates, 1 C.A.A. 220 (1939) 9
Pan American-Grace Airways, Inc.—Mail Rates, 3 C.A.B. 550 (1942) 11, 12
Pennsylvania Central Airlines Corp. Motions, 8 C.A.B. 685 (1947) 11, 13
Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, 181 F. 2d 515 (D.C. Cir. 1950) *cert. denied*, 339 U.S. 963 (1950) 15
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) 8, 21, 22

PAGE

Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947) 8, 21, 22
Southwest Airways Company, Mail Rates, 11 C.A.B. 651 (1950) 12
St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1935) 20
Summerfield v. Civil Aeronautics Board, 207 F. 2d 207 (D.C. Cir. 1953), *aff'd sub nom Delta Air Lines v. Summerfield*, 347 U.S. 74 (1954) 4, 24, 25
Transatlantic Final Mail Rate Case, 19 C.A.B. 464 (1954) 12
Transcontinental & Western Air Inc. v. Civil Aeronautics Board, 336 U.S. 601 (1949) 10, 11, 13, 20
Trans World Airlines, Inc., Control by Hughes Tool, 12 C.A.B. 192 (1950) 11
Washington Gas Light Co. v. Baker, 188 F. 2d 11 (D.C. Cir. 1950) *cert. den'd* 340 U.S. 952 (1951) 20
West Ohio Ga. Co. v. Public Utilities Commission, 294 U.S. 79 (1935) 21

STATUTES:

Federal Aviation Act of 1958, Section 406, 72 Stat. 763, 49 U.S.C. Sec. 1376 ..... 5, 8, 9, 10, 14, 15, 16, 18, 25
Merchant Marine Act of 1936, Section 607, 49 Stat. 2005, 46 U.S.C. 1177 (*c*) 10
Transportation Act of 1920, Section 15a, 48 Stat. 220, 49 U.S.C. 15a 10

MISCELLANEOUS:

Annual Report of the Civil Aeronautics Board, 1949 12
First Annual Report of the Civil Aeronautics Authority, Fiscal Year Ended June 30, 1939 9

In The

Supreme Court of the United States

October Term, 1960

No. .....

Delta Air Lines, Inc.,

Petitioner

v.

Civil Aeronautics Board,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Delta Air Lines, Inc., Petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 2, 1960.

OPINIONS BELOW

The opinions of the Civil Aeronautics Board (R. 127-270 and 275-298) are not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix A, *infra*, pp. 27-34) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1960 (Appendix A, *infra*, p. 35). A timely

petition for rehearing filed on June 17, 1960 (R. 308-319) was denied on July 13, 1960 (R. 320). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), and Title 49, United States Code, Section 1486(f).

QUESTIONS PRESENTED

1. Whether the authority of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) and *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 79 (1935) controls the disposition of a remanded subsidy mail rate proceeding under Section 406 of the Federal Aviation Act, so as to permit, and compel, the Civil Aeronautics Board retroactively to revise that portion of the mail rate which was never challenged during the entire period it was in effect and upon which carriers, bankers and the investing public relied in substantial financial transactions.

2. Whether, in the remanded proceedings, following *Delta Air Lines* v. *Summerfield*, 347 U. S. 74 (1954), the Civil Aeronautics Board complied with the decision of this Court when it re-adopted defective rate of return findings made prior to judicial review.

STATUTES INVOLVED

The pertinent provisions of Section 406 of the Federal Aviation Act of 1958, 72 Stat. 763, 49 U.S.C. 1376 (and of its predecessor, the Civil Aeronautics Act of 1938, as amended, 52 Stat. 998, 49 U.S.C. 486) are set forth in Appendix B, pp. 36, 37, *infra*.[1]

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[1] As of December 31, 1958, the Civil Aeronautics Act of 1938 was repealed and re-enacted as the Federal Aviation Act of 1958. The repeal and re-enactment did not substantively affect any statutory provisions pertinent to this case.

STATEMENT

Prior to its merger into Delta Air Lines, Inc. (the Petitioner here), Chicago and Southern Air Lines, Inc. (C&S) conducted both domestic and international operations.

Service over C&S' international division began on November 1, 1946. In accordance with its past practice, the Board fixed a series of "temporary" rates for C&S and delayed establishing a final mail rate until sufficient operating experience had accumulated upon which a rate could reasonably be set. Such a rate was finally fixed on October 18, 1951, by Order No. E-5793 (R. 19-27). It was in two parts: a "past period" rate based upon C&S' actual operating experience for the period from November 1, 1946, through December 15, 1950, and a "future period" rate based upon forecast operating results to be effective on and after December 16, 1950, until such time as the Board or the carrier reopened the rate. This future period rate remained in effect until July of 1952, when the Board reopened the rate and established a new and lower future period rate.[1]

After the Board had fixed C&S' international rate in October of 1951, the Postmaster General, who was a party to the proceeding, sought judicial review of the order fixing the international rate. He did not challenge the validity of operating results upon which the "past period" rate had been set, or the forecasts upon which the "future period" rate had been fixed. His challenge went outside of the international rate and focused upon a previously established final mail rate for C&S' *domestic* division. He contended that C&S had received excess earnings under that domestic division rate and that such excess earnings should have been applied in reduction of, or offset against, the international rate fixed by the Board. The

[1] *Chicago & Southern Air Lines, Inc., Latin American Mail Rates*, 16 C.A.B. 536 (1952).

Court of Appeals for the District of Columbia Circuit, affirmed by this Court, sustained the Postmaster General in his contention that mail rates must reflect the need of the carrier as a whole, and held that if there were any excess domestic division earnings, they should have been offset against the international rates. It therefore set aside the order fixing the international rate and remanded the case to the Board with directions "to determine and fix the rates in accordance with this opinion." *Summerfield* v. *Civil Aeronautics Board*, 92 U.S. App. D.C. 256, 258, 207 F.2d 207, 209 (1953), *aff'd sub nom., Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954).

On remand hearings were held to determine the amount, if any, of excess earnings under the domestic division rate to be offset against the international rate. Five days before the oral argument scheduled on this matter in February of 1956, however, the Board *sua sponte* raised an additional issue. (R. 41-42). That issue was whether the Board should *also* go forward in the remanded proceeding on the offset issue to retroactively redetermine, on the basis of actual operating results, that portion of the international rate which the Board had fixed for a future period commencing December 16, 1950, on the basis of forecast operating results. As noted above, this future rate had run for a 19½ month period through July of 1952 when the Board reopened the rate and set a new lower rate. Looking at the situation in 1956, the Board contended that C&S had actually earned a higher rate of return than had been anticipated in the forecasts upon which this rate had originally been fixed back in October of 1951 and that, therefore, the rate should now be retroactively revised.[1]

[1] The Board said it had forecast a 10% return but that it appeared the carrier had earned 36% during this 19½ month period. (R. 54) See note, p. 11 *infra*.

The level of earnings under the future period international rate was never challenged before, or during, the period it was in effect, between December 15, 1950, and July 31, 1952. At the time the rate was fixed, in October of 1951, a considerable portion of the future period commencing December 16, 1950, had already run and there were actual operating results on file with the Board for a substantial period against which the forecasts could be tested. (R. 51, 65). Nevertheless, the Board allowed the rate to go into effect on the basis of the forecasts *without objection* from the Postmaster General. *Nor did the Postmaster General challenge the level of that rate on judicial review.* The sole question raised, considered, and decided on appeal related to whether *domestic* division earnings should have been offset against the international rate. The Board itself, although it had the statutory authority to reopen the future period international rate at any time it was deemed excessive,[1] took *no* action to do so until July of 1952, when, as noted above, while judicial review proceedings were pending on the offset issue, it reopened the rate and set a new, lower rate.[2]

It was therefore not until 1956, in the latter stages of the remanded offset proceeding and some five years after the future period international rate had been fixed in 1951, that any challenge to that rate was made for reasons other than offset of domestic earnings. During this five year period, very substantial reliance had been placed upon the integrity of that rate in essential financial transactions. Delta stockholders acquired C&S at a price reflecting the fact that the *sole* contingent liability which might arise from the then pending judicial review pro-

[1] Section 406(a) of the Federal Aviation Act of 1958, 72 Stat. 763, 49 U.S.C. 1376 (and of its predecessor, the Civil Aeronautics Act of 1938, as amended, 52 Stat. 998, 49 U.S.C. 486).

[2] Nor did the Postmaster General request the Board to reopen the rate, although he had the statutory right to do so. *Ibid.*

ceedings related to a possible reduction in the level of the international rate by reason of an offset of domestic division earnings. Banks loaned Delta in excess of $50,000,000 on the same basis. Similarly, dividends were declared, equipment purchases consummated, and representations made to, and accepted by, the public in security issues under the same understanding. (R. 63, 90-93, 96-101, 117).

Nevertheless, late in 1956, the Board, by a divided decision, held that the Board had the authority to, and *must*, redetermine the future period international rate on the basis of actual operating results. The Board described the basis for its holding as follows:

> "A Majority of three members of the Board, two Members dissenting, made a final determination in Order No. E-10593, *supra*, that as a matter of law, the Board can and must redetermine the mail rates for the international division of C&S at this time for the period December 16, 1950, through July 31, 1952, on a past period basis, and that the Board's prior determination of the international rate, based in part upon forecasts, could no longer stand. The majority stated, *inter alia*, that the Board is authorized to open the proceedings to redetermine C&S' international rate on a past period basis pursuant to the mandate of the Court in *Summerfield* v. *Civil Aeronautics Board*, 207 F. 2d 207 (1953), that even if it is not so authorized by the mandate, the Board may still redetermine the C&S' international rate on a past period basis on the authority of *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); and that the Board has no discretion to decline to make such a redetermination, even if it wanted to do so, in view of the decision in *West Ohio Gas Co.* v. *Public Utility Commission*, 294 U.S. 79 (1935)." (R. 211-212).

Accordingly, the case was reopened for further hearings to retroactively revise the future period international rate on the basis of actual operating results.

In its final decision, rendered in 1959, the Board fixed a new mail rate for C&S' international division for the period November 1, 1946 through July 31, 1952, the period covered by the international rate fixed by the Board order set aside by the court in 1953. The new rate reduced the mail compensation already paid to C&S by $1,795,000, a reduction of 45% of all of C&S' earnings for this period. (R. 71) Of this amount, $1,066,000 was recaptured solely by the retroactive revision of C&S' future international rate for the period December 16, 1950 through July 31, 1952 on the basis of actual operating results. (R. 231) The remainder, $729,000 was recaptured as excess domestic division earnings to be offset against the international rate. (R. 231)

At the conclusion of the proceedings before the Board, Delta sought judicial review in the Court of Appeals for the District of Columbia Circuit, under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486.

The Court of Appeals sustained the power of the Board to retroactively revise C&S' future international rate primarily on the grounds "that the principles underlying *Pittsville* are applicable here." (R. 304) Its opinion is attached hereto as Appendix A.

The Court of Appeals also declined to review an additional challenge to the validity of the reopening presented by Delta. Delta contended that even if the Board had the power to reopen the case under the *Pittsville* case, it was not *compelled* to do so as a matter of case law under the *West Ohio Gas. Co.* case, but had discretion in the premises which it had not exercised. The Court of Appeals declined to review that challenge on the grounds that the Board's "opinion clearly indicates that, even if it were not required to reopen, it would do so in the exercise of sound discretion" (R. 306). Delta filed a petition for

rehearing wherein it claimed, in reliance upon the *Chenery* cases,[1] that the Court of Appeals could not draw such an inference from the Board's opinion in the face of the Board's own unequivocal finding, quoted immediately above, that it had "no discretion to decline to make such a redetermination, even if it wanted to do so, in view of the decision in *West Ohio Gas* . . ." (R. 311) The Court of Appeals denied Delta's petition for rehearing without opinion. (R. 320)

In addition to its challenge in the court below to the reopening of the future international rate, Delta contested the validity of the Board's order on the grounds that the domestic rates were not open for review after December 16, 1950 for "offset" purposes, and that there were no valid findings to support C&S' "need" for earnings included in the new rate. Nevertheless, the court below affirmed the Board's order.

REASONS FOR GRANTING THE WRIT

I. It is essential to the proper administration of the mail pay provisions of Section 406 of the Federal Aviation Act, upon which the financial stability and operating efficiency of the air transportation industry is dependent, for this Court to determine whether, in a remanded mail rate proceeding, the Civil Aeronautics Board may, and must, retroactively revise that portion of a mail rate never challenged while it was in effect and upon which there was substantial reliance in vital financial transactions.

In order that the import of the Court's action below can be adequately visualized, it is important at the outset to review briefly the reasons for the enactment of the

[1] *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943) and 332 U.S. 194 (1947).

Civil Aeronautics Act of 1938, the function therein of mail rates called for by Section 406 of the Act, and the administration of that section for the past twenty two years.

The plight of the air transportation industry at the time the Civil Aeronautics Act of 1938 was passed was graphically described by the Board in its first Annual Report[1] as follows:

> ". . . When the Civil Aeronautics Authority assumed office it found the American air transport industry in a state described by the House Committee in charge of the new legislation as 'chaotic.' Half of the private capital which had been invested in the industry had been irretrievably lost. The result of shaken faith on the part of the investing public in the financial stability of the airlines was preventing the flow of greatly needed funds into this industry. . . .

[1] H. Rep. No. 2254, 75th Cong., 3d Session, Page 2"

Aware of the financial condition of the industry, one of the means selected by Congress to restore financial integrity and promote the development of the industry was a comprehensive policy of Government financial aid and encouragement to those airlines whose commercial revenues did not cover operating expense and return a profit element.[2] The statutory device used to channel this aid to the air transportation industry was the "need" mail rate authorized in Section 406 of the Act which gives a carrier the subsidy required, in the language of Section 406, "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." (Appen. B, p. 37, *infra.*)

[1] First Annual Report of the Civil Aeronautics Authority, Fiscal Year Ended June 30, 1939, p. 1.

[2] *Pan American Airways Co. (Del.)-Transatlantic Mail Rates*, 1 CAA 220, 253 (1939).

Congress also recognized that vital to the success of the statutory purpose of Section 406 was the establishment of mail rates upon which a carrier and the public could rely in their financial transactions and which were not subject to retroactive revision. Congress declined to follow any of the historic statutory patterns calling for profit recapture.[1] It also declined to establish a "cost plus" system of rate making wherein a carrier is guaranteed its costs plus a specified rate of return and necessarily embraces a retroactive revision of rates. This Court held in *TWA* v. *Civil Aeronautics Board*, 336 U.S. 601, 606 (1949) that a "cost plus" system of regulation ". . . would not harmonize with the apparent design of the Act."

In its reported decisions the Board has spelled out in detail the two basic reasons why a "cost plus" system of rate making embracing retroactive revisions would thoroughly frustrate the developmental purposes of the Act.

First, ". . . an administration of the act must, of necessity, involve a policy of rate determination which will serve to recognize managerial efficiency and to permit benefit therefrom to redound to the carriers, thus providing an incentive to management for further development."[2] Under prospective rate-making, not subject to

[1] Section 15a of the Transportation Act of 1920, 41 Stat. 488, and Section 607 of the Merchant Marine Act of 1936, 49 Stat. 2005, 46 U.S.C. 1177(c), authorized the Interstate Commerce Commission and the Maritime Commission, respectively, to recapture excessive profits from carriers by rail and water. The Transportation Act was amended in 1933 to eliminate this feature and to establish reasonable rates based on "need". 48 Stat. 220, 49 U.S.C. 15a(2). The "need" language used in Section 406 of the Civil Aeronautics Act follows the language of Section 15a of the Interstate Commerce Act, and the rate-making principles of the Interstate Commerce Act were carried over into the Civil Aeronautics Act. *TWA* v. *Civil Aeronautics Board*, 336 U.S. 601, 604-605 (1949).

[2] *Mid-Continent Airlines, Inc., Mail Rates*, 1 C.A.A. 45, 55 (1939).

retroactive revision, "there is a twofold pressure to economy and efficiency caused by the necessity of living within a known rate and by the prospect of being able to retain earnings which may be effected under the rate."[1] A policy involving the recapture of earnings, on the other hand ". . . would tend to sap management of those very incentives that in a private economy are essential if we would strive for efficiency."[2]

Second, a policy of retroactive rate revision ". . . writes a question mark across the carrier's financial statements which purport to reflect its true financial condition; for such statements, upon which investors may have relied, may subsequently be rendered misleading by a retroactive order of the Board."[3] To the extent that ". . . such incidents create uncertainty as to the carrier's financial posi-

[1] *Pennsylvania Central Airlines Corp. Motions*, 8 C.A.B. 685, 696 (1947), *aff'd. sub nom. Transcontinental and Western Air, Inc. v. Civil Aeronautics Board*, 338 U.S. 601 (1949).

[2] Idem., p. 697. The Board has customarily forecast a rate of return in future mail rates at 8% for domestic rates and 10% for international rates. (These rates are higher than those usually found in other public utilities because of the higher risk factor in air transportation where earnings are highly volatile and vary sharply with bad weather, cyclical changes in business etc. *See Trans World Airlines, Inc., Control by Hughes Tool*, 12 C.A.B. 192, 219 (1950)). Actual earnings under final rates, however, frequently exceed these returns. Thus in 1951 and 1952 (years under consideration here) the average rate of return on investment of the 7 intermediate size carriers, including C&S, was in excess of 20%, as pointed out by the Board below (R. 294). However, when consideration is "given to total results over a reasonably extended period," which is the approach the Board usually uses in measuring the reasonableness of earnings, *American Airlines Mail Rates*, 3 C.A.B. 323, 346 (1942), the average return for the period 1946-1952 (the period covered by the rate order below) was 10.49% for the group, and 8.16% for C&S (before any recapture of earnings). (R. 294-295)

[3] *Pan American-Grace Airways, Inc., Mail Rates*, 3 C.A.B. 550, 565 (1942); *Pennsylvania Central Airlines Corp., et al.*, Motions, 8 C.A.B. 685 (1947) at 698.

tion, they tend to impair its ability to attract capital, and a program of debt financing on terms unfavorable to the carrier would inevitably result." [1]

In conformity with the foregoing, the Board has resisted all efforts to turn its mail rate function into a "cost plus" system of regulation.

Administrative necessity has forced one exception. If it appears that a substantial amount of time will elapse between a rate reopening and the fixing of a final rate because insufficient operating experience has accumulated over a new route or with new equipment upon which to base a forecast for a future rate, the Board may establish a "temporary" rate, clearly subject to revision, in order to give the carrier interim working capital.[2] Under these circumstances the Board frequently, as in the case below, will eventually set a "past period" final rate from the date of reopening throughout the period for which actual operating results are available (in effect, a "cost plus" rate), and a "future period" final rate based upon forecasts which, in turn, are based upon the prior experience.

Absent this one exception, which is unique in public utility rate regulation,[3] the Board has refused to adopt the "cost plus" method of rate making. It has sought to establish final rates, rather than temporary rates, whenever possible.[4] It has rejected, as contrary to the Act,

[1] *Pan American-Grace Airways, Inc.—Mail Rates*, fn., *supra*, at 565.

[2] *National Airlines, Inc., Mail Rates*, 9 C.A.B. 264, 266-267 (1948); *Northwest Airlines, Inc., Trans Pacific Mail Rates*, 12 C.A.B. 256 (1950); Annual Report of the Civil Aeronautics Board, 1949, p. 3.

[3] *Transatlantic Final Mail Rate Case*, 19 C.A.B. 464, 614 (1954).

[4] *Southwest Airways Company, Mail Rates*, 11 C.A.B. 651, 653 (1950).

a proposal of the Post Office Department to adopt temporary rates as a matter of general policy ". . . for the sole purpose of placing (the Board) in a position to retroactively adjust the rate so established."[1] It has resisted all efforts to undermine the integrity of previously established and unchallenged mail rates by declining to retroactively revise a mail rate any farther back than the date the previously existing rate was challenged by the application for a new rate,[2] and in doing so has been affirmed by the courts.[3] In short, it has recognized ". . . that a rate once fixed should remain final at least until such time as the rate is first publicly challenged or questioned by the institution of a rate proceeding, either upon petition of the carrier or on the Board's initiative."[4]

The key date is that upon which the rate is challenged. Obviously, once a final mail rate is reopened by the Board or carrier ". . . all interested persons are put on notice that the mail rate may be adjusted and that future actions should be determined in that light."[5] The carrier is aware that any temporary rate pursuant to which it operates in the "open" rate period is subject to retroactive revision. Once a final future rate is fixed, however, the carrier, its bankers, and the investing public proceed on the basis that the rate is not subject to retroactive revision until such time as it is reopened by the

[1] *Braniff Airways, Inc.-Mail Rates*, 18 C.A.B. 162, 169 (1953).

[2] *Pennsylvania Central Airlines, Corp., Motions*, 8 C.A.B. 685 (1947), aff'd. *sub nom. Transcontinental and Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601 (1949).

[3] *Idem; Capital Airlines, Inc.* v. *Civil Aeronautics Board*, 171 F. 2d 339 (D.C. Cir. (1948)).

[4] *Braniff Airways, Inc., Mail Rates or Routes Nos. 9, 15 and 50*, 3 C.A.B. 633, 635 (1942).

[5] *All American Aviation, Mail Rate for Route No. 49*, 4 C.A.B. 354, 357 (1943). When a rate is reopened, carriers customarily note that fact in financial statements distributed to the public.

Board, because operating results are more favorable than in the forecast upon which the rate was based, or by the carrier because the forecast proved optimistic. This reliance is in accordance with Congressional intent in Section 406 of the Act to preserve financial stability and operating efficiency in the air transportation industry, as pointed out above.

In the case below the final future rate established in October of 1951, and effective on and after December 16, 1950, was not challenged until July of 1952 when the Board reopened the rate in accordance with its announced policy of ". . . maintaining a continuing review of results of all carriers operating under final rates to guard against such rates *becoming* excessive." (Emphasis supplied)[1] No one questioned the level of this rate while it was in effect. Indeed, it was not questioned *until 1956* when in the latter stages of the remanded proceeding on the offset issue the Board decided to retroactively revise the rate on the basis of actual operating results. (pp. 4-6, *supra*)

The decision of the court below affirming this action of the Board cuts across the basic concept of Section 406 of the Act to preserve the integrity of unchallenged mail rates. It is an unqualified endorsement of the "cost plus" system of rate making which Congress refused to adopt in Section 406 and which this Court has declared ". . . would not harmonize with the apparent design of the Act." *TWA* v. *Civil Aeronautics Board*, *supra*. Indeed, if the decision of the court below is affirmed, the evils of the "cost plus" system of rate making could be spread over much of the life of a carrier because judicial review and remanded proceedings can last for a long time—*seven years in the instant case*. During this period there would be no incentive for managerial efficiency. Nor

[1] *Chicago and Southern Air Lines, Inc., Latin American Mail Rates*, 16 C.A.B. 536, 537 (1952).

would there be any accurate appraisal of a carrier's financial position. Financial stability, credit ratings, and the ability to raise private capital would all be jeopardized. The decision of the court below, therefore, strikes at the heart of the Act which is to promote the development of air transportation.

In this respect the decision below will have an immediate importance far beyond the particular facts and the parties here involved and affects the entire air transportation industry. The Board has permitted other carriers [1] and even railroads [2] to become a party to final mail rate proceedings, in addition to the Postmaster General.[3] Any of these intervenors can stamp a question mark across the balance sheet of an air carrier for a considerable period of time by the single expedient of seeking judicial review of one limited aspect of a future rate fixed by the Board. Further, the carrier itself for whom a rate is being set, will hesitate to seek judicial review on any aspect of a rate proceeding if, by doing so, it is placing itself in a "cost plus" position for an indeterminate period. The right of judicial review would thus become a hollow right.

It is for the foregoing reasons that Petitioner contends that it is essential to the proper administration of the mail pay provisions of Section 406 of the Federal Aviation Act, upon which the financial stability and operating efficiency of the air transportation industry is dependent, for this Court to determine whether, in a remanded subsidy mail rate proceeding, the Board may, and must,

[1] *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 515 (D.C. Cir. 1950), *cert. denied* 339 U.S. 963 (1950).

[2] *Mohawk Airlines, Inc., Mail Rates*, Order No. E-13202, Nov. 26, 1958.

[3] By Reorganization Plan No. 10, Aug. 1, 1953, the Postmaster General's responsibility for payments was limited to "service", or nonsubsidy, rates. Accordingly, his interest is now confined to "service" rate proceedings.

retroactively revise that portion of the mail rate never challenged while it was in effect and upon which there was substantial reliance in vital financial transactions.[1]

II. The Court of Appeals for the District of Columbia has misapplied the decision of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). This case, which enunciated the principle of administrative flexibility on remand, has never been cited in a remanded rate proceeding in the twenty years since it was decided, and most certainly has never controlled the disposition of a remanded rate proceeding under the specialized provisions of Section 406 of the Federal Aviation Act. The effect of doing so is to render unstable prior unchallenged rate determinations upon which there has been substantial reliance.

The Board, affirmed by the court below, relied upon *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), as providing the necessary power for the Board to retroactively redetermine the level of C&S' future period international mail rate in the remanded proceeding on the offset issue. (Appen. A, p. 32, *infra*)

Pottsville was an FCC licensing proceeding. On remand of an order denying a license application, the Commission consolidated and heard two subsequently filed rival applications. The Court of Appeals reversed on the

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[1] The same principles set forth above apply to the retroactive revision for offset purposes of that portion of C&S' domestic rates after December 16, 1950. The Postmaster General stated in his brief to this Court on the prior appeal that the *sole* issue related to offsetting excess domestic division earnings against the international rate for the period 1948 through *1950*. (R. 36) Indeed, he *concurred* in the new domestic division future rate fixed in December of 1951 and effective on and after October 1, 1951 (R. 38). Nevertheless, the Board, affirmed by the court below, retroactively revised the domestic rates after December 16, 1950 for offset purposes.

grounds that the Commission could not reconsider matters which the court appeal had laid at rest.[1]

The Supreme Court reversed. In a comprehensive opinion, Mr. Justice Frankfurter first reviewed the purposes of the Federal Communications Act as meeting ". . . a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."[2] To meet this fear, he pointed out that Congress had provided for a very flexible administrative control in order to give the Commission "a grip on the dynamic aspects of radio transmission."[3] As an example thereof, he indicated that "it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years. . . ."[4]

It was "against this background" that the Court considered the case.[5] It held that "the fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed" because such an implication is "at war with the basic policy underlying the statute."[6] It held that an administrative agency, on remand, requires the flexibility to continue to ". . . enforce the legislative policy committed to its charge."[7]

As enunciated and applied within the statutory framework and factual situation within which the case arose,

[1] 309 U.S. 134, 140.

[2] Idem. at 137.

[3] Idem. at 138.

[4] Idem.

[5] Idem. at 139.

[6] Idem. at 145.

[7] Idem.

the *Pottsville* doctrine of administrative flexibility on remand is a salutory one. But it has no application whatever to remanded mail rate proceedings under Section 406 of the Federal Aviation Act. The Civil Aeronautics Act of 1938, unlike the Federal Communications Act, under which *Pottsville* arose, was not designed principally to prevent "monopolistic domination" by a flexible control of renewable 3 year licenses. One of its principal purposes was to restore financial stability to a completely demoralized industry through the security of permanent certificates,[1] and a comprehensive program of government support under mail rates upon which a carrier could rely. (pp. 9, 10, *supra.*) There is nothing in the Civil Aeronautics Act, or its legislative history, which demonstrates a "legislative policy" endorsing the complete flexibility which Mr. Justice Frankfurter found to underly the Federal Communications Act, and most certainly there is nothing to support a flexible "cost plus" system of rate making. (pp. 10-13, *supra*) Yet, the effect of applying *Pottsville* to a remanded mail rate proceeding, as the court below has done, has *exactly* this effect.

A further significant distinction lies in the matter of reliance. *Pottsville* can be applied in FCC licensing pro-

[1] Congress made permanent, as "grandfather" certificates, the operations of all carriers at the time it enacted the Civil Aeronautics Act of 1938. (Section 401 (e)(1), deleted in the recodification of Federal Aviation Act.) It also gave the Board power to issue new permanent or temporary certificates. (Section 401 of the Civil Aeronautics and now recodified as Section 401 of the Federal Aviation Act, 72 Stat. 754, 49 U.S.C. 1371). It is also significant to note that on three subsequent occasions Congress has *directed* the Board to make permanent certain previously issued temporary certificates, thereby indicating its intent to give stability to the air transportation industry. (Section 401(e)-(5) of the Civil Aeronautics Act of 1938 deleted in the recodification of the Federal Aviation Act.) This program of permanent certification is to be distinguished from the flexible three year licensing system of the Federal Communications Act referred to by Mr. Justice Frankfurter, *supra*.

ceedings, and related cases arising under other statutes, without undue violence. In the initial proceeding before the Commission, Pottsville's application for a construction permit was denied. Therefore, there was no grant upon which Pottsville could rely, and on remand, nothing could be taken away because it had nothing. That is *not* the case here. There *was* very substantial reliance in vital financial transactions upon an unchallenged mail rate which the Board retroactively revised several years later in a remanded proceeding on an unrelated point. (pp. 5, 6, *supra.*)

The fact is that *Pottsville*, which arose under a statute which does *not* embrace rate regulation in the broadcasting field, cannot be applied to any remanded rate proceeding. Indeed, in the 20 years since that decision, it has never been cited as controlling a remanded rate proceeding. That fact is not difficult to understand when it is remembered that *Pottsville* was designed to give administrative agencies flexibility in fulfilling their regulatory functions on remand. Flexibility in rate determinations, however, is quite another matter. The most disruptive development in administrative regulations would be one which renders unstable prior rate determinations of an administrative agency upon which there has been substantial reliance. Administrative regulation in the rate field demands confidence in the integrity of unchallenged, and relied upon, rate determinations.[1]

[1] This is the import of *Arizona Grocery Co.* v. *Atchison T. and S. F. Ry.*, 284 U. S. 370 (1932) which holds that the Interstate Commerce Commission cannot reopen a final rate determination and retroactively apply a lower rate. The court below sought to distinguish this case on the grounds that there a "final" rate determination had been made whereas here there was no "final" rate determination after the Court of Appeals had set aside the order fixing the rate at the conclusion of judicial review proceedings on the offset appeal in 1953. The *Arizona* case cannot be so narrowly construed. It embraces *all* unchallenged rate determinations. The order establishing C&S' future rates for the

The court below, relying upon the dissent of Mr. Justice Jackson in the *TWA* case, draws a distinction between airline subsidy proceedings and ordinary rate proceedings and implies, at least, that whereas *Pottsville* might not be applicable to the latter, it is to the former. (Appen. A, pp. 32, 33, *infra*)[1]. Petitioner fails to see any substantive effect in this case of the distinctions unsuccessfully urged by Mr. Justice Jackson in the *TWA* case. But in any event there are actually *more* compelling reasons why *Pottsville* is not applicable to a remanded proceeding under the specialized provisions of Section 406 of the Federal Aviation Act than to an ordinary remanded rate proceeding.

This should be already evident from the discussion above of the peculiar problems from which regulation of air transportation sprang. In addition, however, it should be noted that in the ordinary rate appeal the rate is frequently enjoined in its entirety or a court fund is established for the disputed amounts pending disposition of the appeal, thereby eliminating the possibility of any reliance.[2] In the case below, however, the Postmaster General *paid* the rate and the Board proceeded in the *same* manner, just as if there were no court appeal, when it reopened the rate at a time it appeared to be excessive. The sole challenge before, and during the appeal, was offset. The integrity of the rate, except as to offset domestic earnings, was relied upon by the carriers and the public in vital financial transactions.

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period December 16, 1950, through July 31, 1952, *was* final and was in effect *throughout that entire period*. The rate was *not* challenged (except as to offset) prior to, or during, that period.

[1] *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U.S. 601 (1949). A majority of this Court, however, held that Section 406 of the Federal Aviation Act "reads like a typical public utility rate-making authority." 336 U.S. 601, 604.

[2] *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1935) (rate enjoined); e.g. *Washington Gas Light Co.* v. *Baker*, 188 F.2d 11, 23 (D.C. Cir. 1950) *cert. den'd* 340 U.S. 952 (1951).

It is Petitioner's contention that the Court of Appeals has completely mi-applied the *Pottsville* case. *Pottsville* is no authority for the proposition that the Board may stand by for a substantial period of time while a merger is effected which it formally approves, millions of dollars worth of bank loans are consummated, and representations are made to the public in security issues, and *then* require the reduction of over a million dollars in a theretofore unquestioned mail rate determination upon which there had been substantial reliance.

The misapplication of the *Pottsville* case by the court below destroys confidence in unchallenged and relied upon mail rate determinations. In order to preserve financial stability and rate integrity this Court must correct that error.

III. The Civil Aeronautics Board held that it was compelled by *West Ohio Gas Co.* v. *Public Utilities Commission*, 284 U. S. 79 (1935) to make the retroactive rate revision. The court below, in direct conflict with the decisions of this Court in *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943) and 322 U. S. 194 (1947) declined to review Petitioner's challenge to this holding of the Board by inferring from the Board's opinion what the Board might do if it had not relied upon the *West Ohio Gas Co.* case. The court below further failed to find that the Board's application of the *West Ohio Gas Co.* case to a remanded rate proceeding conflicts with the holdings of this Court in *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219 (1947) and *ICC* v. *Jersey City*, 322 U. S. 503 (1944).

Delta contended before the court below that even if the Board had the power to retroactively revise C&S' future international rate for the period December 16, 1950 through July 31, 1952 in the remanded offset proceeding under *Pottsville*, it was not *compelled* to do so as a

matter of case law under the *West Ohio Gas Co.* case, but, rather, had discretion in the premises which it had not exercised.

The court below held that it was not necessary to reach Delta's contention because ". . . (the Board's) opinion clearly indicated that even if were not required to reopen, it would do so in the exercise of sound discretion." (Appen. A, p. 34 *infra.*)

If the Court of Appeals declined to consider Delta's argument on the grounds that the Board has *already* made a finding that it would redetermine the rate as an exercise of discretion, the Court of Appeals decision is in conflict with the decision of this Court in *SEC* v. *Chenery Corp.* 332 U. S. 194 (1947) holding that the basis of administrative action upon which it is to be reviewed must be spelled out in a clear and precise manner. It cannot possibly be said that there is a clear and precise finding by the Board that it *did* exercise its discretion in the face of an unequivocal statement that it had

> ". . . no discretion to decline to make the redetermination, even if it wanted to do so, in view of the decision in *West Ohio Gas Co.* v. *Public Utility Commission*, 294 U. S. 79 (1935)." See p. 6, *supra.*

On the other hand, if the Court of Appeals intended to decline to consider Delta's argument on the grounds that if the case were remanded to the Board, the Board would *then* make such a finding, the Court of Appeals decision is in conflict with *SEC* v. *Chenery Corp.* 318 U. S. 80 (1943). This case holds that a court must review administrative action solely on the grounds invoked by the agency and that a court may not supply a missing finding. There is no finding by the Board as to what it *might* do *if* it were relieved of the erroneous impression that *West Ohio Gas Co.* compelled the rate redetermination.[1]

[1] An inference might be drawn from the fact that both the Board's staff (R. 43) and the two dissenting members (R. 62)

The *West Ohio Gas Co.* case held that it was contrary to the "rudiments of fair play" for a rate making agency to establish a rate for a past period, 1929 through 1932, on the basis of 1929 results, to the exclusion of actual operating results for the depression years of 1930 through 1931.

The case is demonstrably not applicable to a *remanded* rate proceeding. Absent a specific direction from the reviewing court to conduct a *de novo* proceeding on remand, the Board is not compelled to do so. *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219 (1947).[1]

Further, *West Ohio Gas Co.* applies in the initial stages of a rate proceeding. It does *not* apply in the latter stages of a rate proceeding or on remand. The question of whether evidence of record should then be updated has been a matter which has always been left to the discretion of the agency. *ICC* v. *Jersey City*, 322 U. S. 503 (1944).

The decision of the Court of Appeals is not good law. It declines to review a substantial challenge to an important finding of the Board by choosing from conflicting inferences or by hypothecating what the Board might do under different circumstances, all in conflict with decisions of this Court. It leaves standing a decision of the Board misapplying the *West Ohio Gas Co.* case in a remanded mail rate proceeding contrary to basic principles of administrative law announced in the *Donnelly Garment Co.* and *Jersey City* decisions, and in a manner which destroys

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did indicate that *if* they had discretion in the premises, they would *not* have made the rate redetermination. The Majority of the Board, of course, did not express themselves on this point because they acted under the impression that *West Ohio compelled* the rate redetermination.

[1] "Since in our view the remand did not call for a proceeding *de novo*, the Board was not required to reopen any issue as to which its ruling was left unassailed by the Circuit Court of Appeals in its first decision." 330 U. S. 219, 228.

the integrity of unchallenged mail rates upon which there has been substantial reliance. This matter must be resolved by this Court.

IV. The Civil Aeronautics Board, in the remanded proceeding following *Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954), did not comply with the decision of this Court when it re-adopted defective rate of return findings made prior to judicial review.

In *Delta Air Lines* v. *Summerfield*, *supra*, this Court held that although the Board may fix rates separately for different operating divisions of the carrier, the end result must conform to the need of the carrier as a whole. It was therefore the duty of the Board on remand to fix a new international rate for the period November 1, 1946 through July 31, 1952, conforming to the system need of C&S for the entire period.

The Board did not do so. In determining C&S' need for earnings on remand, the Board chopped the system up and found a 10% rate of return reasonable for part of this period, and a 7% rate of return reasonable for the remainder of the period.[1] The 7% rate of return findings were not *new* findings made in the remanded proceeding.[2] They were for past periods made *prior* to the original judicial review proceedings on the offset issue and were simply re-adopted on remand without review.[2]

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[1] The Board applied to C&S' domestic division a 10% return between January 1, 1948 and July 31, 1952, and a 7% return between November 1, 1946 and December 31, 1947; and to C&S' international division a 10% return between December 16, 1950 and July 31, 1952, and a 7% return between November 1, 1946, and December 15, 1950. (R. 133, 164, 283-284)

[2] The domestic division return finding was made in 1948, *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786, and the international division return finding was made in 1951 in the order set aside in the original judicial proceedings. (R. 133, 283-284).

These 7% findings were completely defective because they constituted *ultimate* findings only. They were not supported by *any* subsidiary findings relating to the cost of capital or other measures of the reasonableness of earnings which the Board itself requires, whether in a past or future period, to support an ultimate finding of earnings needed by an air carrier under Section 406 of the Federal Aviation Act. (R. 222-225).

Accordingly, the Board did not comply with the decision of this Court in *Delta Air Lines v. Summerfield, supra*. It could not, in compliance with that decision, re-adopt defective rate of return findings made prior to judicial review on the offset issue to support a new international mail rate replacing that set aside by the court below.[1] This Court should review this challenge to the integrity of its prior decision in this case.

CONCLUSION

The issues which Petitioner raises are of far reaching importance. The decision below strikes down mail rate determinations which were never challenged and upon which there was substantial reliance in vital financial transactions. In doing so, it runs counter to the statutory scheme laid down by Congress in the Civil Aeronautics Act of 1938 (now the Federal Aviation Act of 1958) for the establishment of fair and reasonable mail rates. It further undermines the financial integrity and managerial efficiency of air carriers thereby subverting the Congressional purpose to foster the development of air transportation in this country.

[1] The court below failed to pass on this matter even though it was called to its attention again by a petition for rehearing. It only rejected Petitioner's contentions with regard to the new 10% rate of return findings which the Board purported to make. (Appen. A, p. 34 *infra*).

Wherefore, Petitioner prays that a writ of certiorari may be issued under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit and upon such review the order of said Court of Appeals for the District of Columbia Circuit be vacated, revised, and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the view of this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15084

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On petition for review of orders of the Civil Aeronautics Board

Decided June 2, 1960

Mr. James F. Bell, with whom *Messrs. R. S. Maurer, George C. Neal*, and *Calvin Davison* were on the brief, for petitioner.

Mr. Morris Chertkof, Attorney, Civil Aeronautics Board, with whom *Messrs. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *John H. Wanner*, Deputy General Counsel, Civil Aeronautics Board, *O. D. Ozment*, Associate General Counsel, Litigation and Research, Civil Aeronautics Board, and *Richard A. Solomon*, Attorney, Department of Justice, were on the brief, for respondent.

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER, and BAZELON, *Circuit Judges*.

BAZELON, *Circuit Judge*: This is the second appeal involving efforts of the Civil Aeronautics Board to fix mail-pay rates for the international operations of Chicago &

Southern Airline ("C & S"), subsequently merged with Delta Air Lines ("Delta"), petitioner here.

Mail rates may include a subsidy based on need,[1] as well as compensation for services performed. The purpose of the subsidy is to promote the development of air transportation to the extent required by interstate commerce, the postal service and national defense. Mail rates are usually set prospectively, on the basis of estimated revenues and expenses.[2] When so established, mail-pay rates, like ordinary utility rates, run for an indefinite period, subject to reopening at any time. If, however, a carrier performs services during a period for which no final rate has been previously determined, the Board in setting rates for that past period need not "ignore the known fact[s] and compute the rate as though it were looking at the unknown future as of the beginning of the period."[3] Instead it may set such rates retrospectively on the basis of actual operating results. This method is, in effect, "cost plus" compensation.[4]

The former appeal was from the Board's order of October 18, 1951, fixing new *international* rates on a prospective basis, effective December 16, 1950. At the time that order was entered, several years of actual operations had transpired under the then effective *domestic* rate. This

[1] See § 406 of the Federal Aviation Act of 1958, 72 Stat. 763, 49 U.S.C. § 1376 (1958). This section formerly appeared as § 406 of the Civil Aeronautics Act of 1938, 52 Stat. 998. The repeal and reenactment did not effect any changes significant for present purposes.

[2] *Transcontinental & Western Air* v. *Civil Aeronautics Board*, 336 U.S. 601 (1949).

[3] *Summerfield* v. *Civil Aeronautics Board*, 92 U.S.App.D.C. 248, 207 F.2d 200 (1953), *aff'd sub nom.*, *Western Air Lines* v. *Civil Aeronautics Board*, 347 U.S. 67 (1954).

[4] *Transcontinental & Western Air* v. *Civil Aeronautics Board*, *supra* at 606.

experience revealed profits well in excess of those estimated when that rate was originally set on a prospective basis. The Board refused the Postmaster General's request to "offset" these past excess domestic profits against the new international rate. The Postmaster General appealed. We sustained his position, set the order aside and remanded the case with directions "to determine and fix the rates in accordance with this opinion."[5] The Supreme Court granted certiorari, and affirmed.[6]

On remand, hearings were held to determine the amount of excess profits on the domestic division to be offset against the international mail rate. After hearings before the Examiner and shortly before oral argument to the Board, the Board sua sponte raised the additional question of whether the international rate itself, against which the set-off was to be applied, should be recomputed on a past-period basis. By that time, the international rate period commencing December 16, 1950 had been closed as of July 31, 1952, and complete figures based upon actual operating experience were thus available for the full period. These figures disclosed a 36 percent rate of return—26 percent more than was estimated. The Board decided, over sharp dissent, that under our remand its inquiry was not limited to the question appealed and that it was free, if not required, to redetermine the proper rate on the basis of actual operating results. Delta brought the present petition to review this action.

[5] *Summerfield* v. *Civil Aeronautics Board*, 92 U.S.App.D.C. 256, 258, 207 F.2d 207, 209 (1953), *aff'd sub nom.*, *Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954).

[6] *Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954).
The Supreme Court pointed out that the governing provision of the statute concerns the "need of each such air carrier for compensation" and that the need of the carrier as "measured by the entirety of its operations" is "therefore a limiting factor in the sense that the subsidy may not exceed it." 347 U.S. at 79.

Petitioner challenges the Board's power to reopen the entire rate question, and further contends that, even if the Board had the power, its exercise in this case was arbitrary and an abuse of discretion.

Underlying these contentions is Delta's assertion that its merger with C & S, while the former appeal was pending, proceeded upon the assumption that the C & S international *rate* was final, subject only to a possible set-off; and that it is unfair for the Board to retroactively alter a situation upon which its stockholders, suppliers, financiers and the stock-purchasing public relied.

More specifically, the Board is said to have exceeded its power because (1) the issue of excess profits under the new international rate could have been, but was not, raised and tested upon the prior review, and (2) the mandate of this court, directing the Board "to determine and fix the rate in accordance with this opinion," precluded the Board from considering, de novo, questions not dealt with in our opinion.

With respect to the first argument, it is true that by the time the international rate, effective as of December 16, 1950, was entered in October of 1951, the Board and the Postmaster had available operating figures for at least part of the already elapsed ten-month period of operation under this new rate.[7] But at the time the Postmaster filed his petition for review (March 1952), the international rate was still in effect for an indefinite period. Even if the early operating experience showed an excessive return, the Postmaster could have refrained from challenging the basic rate on the reasonable assumption that further operating experience might be less profitable, thus rendering the average rate for a longer period fair and reasonable.

[7] The international rate here under review remained in effect until July 31, 1952, a total of 19½ months.

Moreover, we agree with the Board that, even if the Postmaster could, as a practical matter, have challenged the rate level upon the prior review, his failure to do so did not, by itself, estop or foreclose the Commission from reconsidering the matter on remand in the light of subsequent events. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 62-64 (1935); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 236 F.2d 289 (3d Cir. 1956). See generally, 2 DAVIS, ADMINISTRATIVE LAW § 18 (1958).

Delta's second argument, that our mandate denied the Board power to reconsider questions not raised on the first appeal, relies upon cases which hold that questions not raised upon appeal are foreclosed upon remand to a lower court;[*] and, in particular, upon *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932), which holds that the Interstate Commerce Commission cannot reopen a final rate determination and retroactively apply a lower rate.

The Board rejected these arguments on the authority of *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). In that case, Pottsville appealed to this court from the Commission's denial of its license application. We reversed on the ground that the Commission had misinterpreted state law, and remanded for reconsideration in light of the applicable legal principles. While judicial review was pending, however, the Commission had received and processed two rival applications for the same facility. After our remand, the Commission consolidated the other applications and Pottsville's for oral argument, to determine which of the three would best serve the public interest. Pottsville then obtained a writ of mandamus from this court requiring

[*] See, *e.g.*, *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (dictum); *Sorenan* (sic) v. *Pyrate Corp.*, 65 F.2d 982 (9th Cir. 1933), *cert. denied*, 290 U.S. 689 (1933).

the Commission to follow the mandate by determining Pottsville's qualifications on the original record, and not on a comparative basis. The Supreme Court reversed, holding that the institutional characteristics of administrative agencies charged with protecting the public interest "at all times" require far greater flexibility and discretion upon remand than is the case with lower courts. The Court recognized that this rule might work hardship in individual cases, but concluded that Congress had largely confined to the agency the job of weighing such hardships against the requirements of the public interest.

We agree with the Commission that the principles underlying *Pottsville* are applicable here. Considerations of administrative flexibility apply to airline subsidy as well as licensing proceedings, for the Board, like the Federal Communications Commission, is required "at all times" to gauge its actions by the public interest standard.[9]

Petitioner likens this case to an ordinary utility rate proceeding, and contends that the application of the nonfinality principle of *Pottsville* in such proceedings would produce chaos. We cannot agree with the premise of this argument. "[U]tility rates apply to a multitude of customers; the air mail rate is paid by only one—the Government. Utility services must be paid for currently; air-mail payments can be and are being paid in lump sums on account of items long past." *Transcontinental & Western Air v. Civil Aeronautics Board*, 336 U.S. 601, 608 (1949) (Jackson, J., dissenting).[10]

[9] Although § 406 of the Federal Aviation Act does not refer to the "public interest" as such, the Board is authorized to award subsidy mail pay in order to promote aviation to the extent required by interstate commerce, the postal service and national defense. 72 Stat. 763, 49 U.S.C. § 1376 (1958). These objectives, as well as the expenditure of Government funds, make public interest considerations implicit.

[10] The majority held in *Transcontinental & Western* that mail subsidy rates *were* to be likened to utility rates for the purpose

Nor do we agree with Delta's claim that it emerged from the former review with a legitimate expectation that the rate would not be reopened. True, the Supreme Court has held that mail-pay rates, like railroad freight rates, once final, cannot be reopened. *Transcontinental & Western Air v. Civil Aeronautics Board*, *supra*; *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, *supra*. Indeed the primary consequence of "finality" seems to be that the rate cannot be reopened. But here the rate order was not final. We set it aside and remanded the case to the Board for further proceedings. Rather than supporting Delta's contention, we think that these cases support the view, at least by implication, that the Board has power to reexamine *non*-final rates.[11]

We do not suggest that Delta and its associates did not *in fact* rely upon the finality of the international rate. Like Pottsville, Delta may well be in a worse position than it would have been if the Board had not erred in the first place. See *Pottsville v. Federal Communications Comm'n*, 70 App.D.C. 157, 162, 105 F.2d 36, 41 (1939). But the Supreme Court, recognizing that hardship can result from the *Pottsville* doctrine, nevertheless, concluded that the agency is the primary tribunal to balance these hardships against the demands of the public interest.

of determining whether a *final* rate could be reopened. But we do not think that it is inconsistent with that holding to recognize the distinctions described by Mr. Justice Jackson for the purpose of determining whether the *Pottsville* doctrine applies to a *non*-final mail rate.

[11] Petitioner also contends that the Board erred in offsetting, against the international rate, excess profits earned in the domestic division in periods subsequent to those mentioned in the former appeal. This contention must fail. The need of the carrier as a whole is the governing factor in setting mail-pay subsidies. *Delta Air Lines v. Civil Aeronautics Board*, 347 U.S. 74 (1954). As long as the international rate was still open, the Board did not err in using the most recent returns on the domestic division to determine the amount to be set off.

Federal Communications Comm'n v. *Pottsville*, 309 U.S. 134, 146 (1940). It has done so here.

What we have said with respect to the Board's power is sufficient to dispel petitioner's claim that the Board abused its discretion in exercising that power.[12]

One question remains for our consideration. The Board decided that, in recomputing the proper mail-pay rates for the period December 16, 1950 to July 31, 1952 on a past-period basis, it would adhere to its former determination that a 10 per cent return is all that C&S needed, even though the return was recomputed on a past-period basis. Delta now attacks the Board's original findings that 10 percent is a proper return on the grounds that this ultimate determination is not supported by subsidiary findings which rationally support the conclusion. We have carefully considered these contentions and find no basis for disturbing the Board's findings. Its thorough and well-reasoned opinion on this phase of the case renders further discussion by us unnecessary.

Affirmed.

[12] Delta points out that, even if we find that the Board had discretion in the matter, the Board found itself compelled by the Supreme Court's decision in *West Ohio Gas* v. *Public Utilities Comm'n*, 294 U.S. 79 (1935), to reopen the entire rate issue. It therefore argues that, unless we agree with the Board's reading of *West Ohio*, we must remand with directions to reconsider whether or not to exercise its discretion. We do not reach the question of whether or not the Board was required to reopen the rate question, or whether failure to do so would be an abuse of discretion, for we think that its opinion clearly indicates that, even if it were not required to reopen, it would do so in the exercise of sound discretion.

Filed June 2, 1960. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 15,084

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On Petition for Review of Orders of the Civil Aeronautics Board

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Before: PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and BASTIAN, *Circuit Judges*.

JUDGMENT

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the orders of the Civil Aeronautics Board on review in this case are affirmed.

Per Circuit Judge Bastian.

Dated: June 2, 1960.

APPENDIX B

Pertinent Provisions of the Federal Aviation Act of 1958, Section 406, 72 Stat. 763, 49 U.S.C. 1376 (and of its predecessor, the Civil Aeronautics Act of 1938, as amended, 52 Stat. 998, 49 U.S.C. 486)

[Matter omitted from the 1938 Act is shown in brackets, new matter in the 1958 Act is printed *in* italic, and law re-enacted unchanged is shown in roman. These changes are of no consequence for the purposes of this case]

Rates For Transportation of Mail

Authority to Fix Rates

SEC. 406 (a). The [Authority] *Board* is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same [; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.].

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Authority] *Board*, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rates in each case, the [Authority] *Board* shall take into consideration, among other factors (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Payment

(c) The Postmaster General shall make payments, out of appropriations for the transportation of mail by aircraft, of so much of the total compensation as is fixed and determined by the Board under this section without regard to clause (3) of subsection (b) of this section. The Board shall make payments of the remainder of the total compensation payable under this section out of appropriations made to the Board for that purpose.

COPY

No. 334

In the Supreme Court of the United States

OCTOBER TERM, 1960

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	8
Conclusion	13

CITATIONS

Cases:

Alabama Public Service Commission v. *Southern Bell Telephone and Telegraph Co.*, 269 Ala. 361, 113 So. 2d 503	10
Crichton v. *United States*, 56 F. Supp. 876, affirmed, 323 U.S. 684	12
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134	7, 9, 10
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17	9
Fly v. *Heitmeyer*, 309 U.S. 146	9
Georgia Public Service Commission v. *United States*, 283 U.S. 765	12
Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503	12
McCart v. *Indianapolis Water Co.*, 302 U.S. 419	10
National Labor Relations Board v. *Donnelly Garment Co.*, 330 U.S. 219	12
Northern States Power Co. v. *Public Utilities Commission*, 73 N. D. 211, 13 N.W. 2d 779	10
Pittsburgh Glass Co. v. *National Labor Relations Board*, 313 U.S. 146	12
Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194	9
Smith v. *Illinois Bell Telephone Co.*, 282 U.S. 133	10

Cases—Continued

	Page
Summerfield v. *Civil Aeronautics Board*, 207 F. 2d 200, affirmed *sub nom. Western Air Lines* v. *Civil Aeronautics Board*, 347 U.S. 67	11-12
Summerfield, Postmaster General v. *Civil Aeronautics Board*, 207 F. 2d 207, affirmed *sub nom. Delta Air Lines* v. *Summerfield*, 347 U.S. 74	3, 4, 8, 12
United States v. *Morgan*, 313 U.S. 409	10
West Ohio Gas Co. v. *Public Utilities Commission*, 294 U.S. 79	11
Yonkers Railroad Co. v. *Maltbie*, 251 App. Div. 204, 296 N.Y.S. 411	10

Statute:

Federal Aviation Act of 1958, Section 406, 72 Stat. 763	3

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 27-34) is not yet reported. The findings and orders of the Civil Aeronautics Board (J.A. 45, 127, 275[1]) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1960 (Pet. 35), and a petition for re-

[1] "J.A." refers to the joint appendix in the court of appeals.

hearing was denied on July 13, 1960 (R. 320). The petition for a writ of certiorari was filed on August 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In determining subsidy mail pay for a carrier's international operations, the Civil Aeronautics Board applied a rate that gave the carrier a return, after taxes, of 7% for past operations and 10% for anticipated future operations. The court of appeals reversed the award because of the Board's failure to follow the statutory requirement that subsidy cannot exceed the need of the carrier as a whole, and remanded the case to the Board to redetermine subsidy on the proper basis. The following questions are presented:

1. Whether, upon such remand, the Board was authorized to recompute the subsidy for the future period, which by then had become a past period, on the basis of the carrier's actual operating results, which showed that under the prior future rate the carrier had received a subsidy return of 36% on investment rather than the 10% that the Board had found the carrier needed.

2. Whether the Board was justified in refusing to reexamine its prior findings, not challenged in the review proceedings, that a return after taxes of 7% satisfied the carrier's subsidy need for the past period.

STATUTE INVOLVED

The pertinent provisions of Section 406 of the Federal Aviation Act (formerly, and without substantive change as it affects this case, the Civil Aeronautics Act) are set forth in Appendix B of the petition for certiorari.

STATEMENT

This case involves a subsidy mail rate fixed by the Civil Aeronautics Board pursuant to the remand in *Summerfield, Postmaster General* v. *Civil Aeronautics Board*, 207 F. 2d 207, affirmed *sub nom. Delta Air Lines* v. *Summerfield*, 347 U.S. 74. The Board had there awarded subsidy for the international operations of Chicago and Southern Air Lines (subsequently merged into petitioner Delta Air Lines) without consideration of the carrier's "excess" earnings from its subsidized domestic operations. The court of appeals, and subsequently this Court, held that the subsidy standard in Section 406 of the then Civil Aeronautics Act (Pet. App. B) was the "need" of the carrier's entire operations viewed as a whole, *i.e.*, that the entire system revenues and the over-all financial position were to be considered in fixing subsidy for any portion of the carrier's operations. The court of appeals set aside the Board order and remanded the case to the agency "with directions to determine and fix the rate in accordance with this opinion" (207 F. 2d at 210).

The order which was set aside (E-5793, J.A. 19) had fixed a "lump sum" subsidy payment for the

international operations for the period November 1, 1946-December 15, 1950, and a subsidy rate based on miles flown for the future international operations beginning December 16, 1950. This "future period" rate continued in force until August 1, 1952, when it was supplanted by a new final prospective rate which was not challenged. Thus, when Order E-5793 was set aside and the case remanded to the Board in 1954, the Board had to redetermine subsidy on the basis that it could not exceed "the need of the carrier as a whole" (207 F. 2d at 209).

The issues in the remanded proceeding here pertinent related to (1) the period of time for which the rate was to be redetermined, *i.e.*, whether for only the past period November 1, 1946-December 15, 1950, or for some or all of the former future period December 16, 1950-July 31, 1952; and (2) the extent to which the Board was required, in determining the carrier's need as a whole for whatever period was selected, to reexamine prior subsidy rates which it had previously fixed on the basis of actual operating experience for various portions of the C & S operations. The carrier contended that only that portion of Order E-5793 fixing the rate for the then past period had been judicially challenged by the Postmaster General; and that the Board could not, and in any event should not, redetermine the rate level for any part of the future period December 16, 1950 to July 31, 1952, which by then had become a past period involving known operating results for all portions of the carrier's operations.

The Board held that it should award subsidy for the entire 1946-1952 period embraced by Order E-5793, based on actual operating results rather than prior estimates (J.A. 47). It rejected the contention that the Postmaster General's challenge had been only to the past period rate (J.A. 47), and found no "waiver" by the government of a right to "offset" domestic profits for a portion of the future period (J.A. 59-61).[2] It further ruled that there was no basis for the carrier's claim that it had been entitled to rely upon the assumption that the Board would not reexamine the future portion of the rate (J.A. 53), or any prejudice to the carrier from the redetermination in terms of the statutory "need" criteria (J.A. 161-164). The Board likewise rejected the contention that, since the Postmaster General had not addressed a challenge to the specific level of the "future period" international rate (as opposed to contending that it should be reduced by offset of profits from the domestic operations), a redetermination of the rate level would be contrary to the mandate of the court of appeals as a matter which could have been, but which was not, litigated in the review proceeding (J.A. 50-51).

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[2] While the Postmaster General's petition for review in terms had challenged the entire order (see J.A. 47), his brief in the court of appeals had stated (see J.A. 59-60) that his "challenge of the future rates relates only to the period December 16, 1950, to September 30, 1951." This statement relied upon the assumption, later proved to be erroneous, that there would be no future "excess" profits since a new lower domestic rate had been established as of October 1, 1951.

The Board stated that it considered itself to be "obliged under the judgment of the Court of Appeals * * * to reestablish mail pay rates for C & S' international operations through July 31, 1952" (J.A. 58). It further ruled that it "would reach this same result" if it were "free * * * to re-examine the rate level for the international division" as a matter of discretion since, "under all the circumstances of this case," failure to do so "would exceed the bounds of sound discretion" (J.A. 59, see also, J.A. 58). The significant circumstances were that, on the basis of the carrier's own reports, "[c]ontinued use of forecast rather than actual experience would result in a 36% return on investment, involving an overpayment to the carrier of more than $1 million in subsidy" (J.A. 58). The Board awarded total subsidy of $4,878,000 for international operations for the period 1946 to 1952—an amount which, it found, met the carrier's "need" for the period (J.A. 133-134).[3] The result of this award was a recapture of excess sub-

[3] The Board pointed out (J.A. 132-133) that:

> "* * * the mail pay need of a carrier is comprised of the amount of mail pay required to meet its breakeven need from operations, incurred under honest, economical, and efficient management, together with such rate of return on the carrier's used and useful investment, after provision for income taxes, as is required to enable the carrier to maintain its financial integrity, attract capital and compensate its investors for the risks assumed, as well as develop to the extent required to meet the objectives of the Act."

All these various factors were determined by the Board to be fully met here.

sidy of $1,795,000, of which $1,066,000 was for the period December 16, 1950-July 31, 1952 (J.A. 127).

In awarding this subsidy, the Board relied on its determinations in the earlier proceedings that a 7 percent return on investment (after taxes) for the international division for the period November 1, 1946-December 15, 1950, and for the domestic division for the period November 1, 1946-December 31, 1947, satisfied the carrier's "need." For the remaining portion of the period, the Board reviewed the carrier's actual operating results and awarded subsidy sufficient to provide a return (after taxes) of 10 percent on investment in foreign operations. The Board refused to reconsider and increase its previously-fixed 7 percent return for the past periods (J.A. 136).

The court of appeals unanimously affirmed. It held that the failure of the Postmaster General to challenge the rate level for the period 1950-1952 in the prior judicial proceedings "did not, by itself, estop or foreclose the Commission [Board] from reconsidering the matter on remand in the light of subsequent events" (Pet. 31); and that under the principle of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, the court's mandate in the earlier review proceeding did not "den[y] the Board power to reconsider questions not raised on the first appeal" (Pet. 31-32). The court stated (Pet. 32) that "[c]onsiderations of administrative flexibility apply to airline subsidy as well as licensing proceedings, for the Board, like the Federal Communications Commission, is required 'at all times' to

gauge its actions by the public interest standard." Finally, the court found no error in the Board's determination of the appropriate rate of return (Pet. 34).

ARGUMENT

Contrary to petitioner's contention (Pet. 25, 8), this case presents no "issues * * * of far reaching importance" "to the proper administration of the mail pay provisions of Section 406 of the Federal Aviation Act." Rather, it involves merely the application of settled principles of administrative law to the particular factual situation here involved, *i.e.*, the effect of the mandate of the court below in the prior case upon the ensuing Board proceedings on remand. We submit that the court below correctly held that, under its earlier mandate and in accord with established principles, the Board was fully warranted in recomputing the international subsidy rate for the entire period in order to insure that the total subsidy allowed did not exceed "'the need' of the carrier * * * as an entity," that is, "as measured by its entire operations" (*Delta Air Lines* v. *Summerfield*, 347 U.S. 74, 79, 80).

1. In its first decision, the court below "set aside" the Board's order fixing subsidy mail pay for the carriers' international operations, and remanded the case "with directions to determine and fix the rate in accordance with this opinion," *i.e.*, that the total subsidy cannot exceed "the need of the carrier as a whole" (207 F. 2d at 210, 209). In such circumstances, "the matter once more goes to the [agency]

for reconsideration" (*Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20), and the agency is not only authorized, but indeed may be required, to apply the applicable statutory standards in the light of conditions then existing. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Fly* v. *Heitmeyer*, 309 U.S. 146; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194; *Federal Power Commission* v. *Idaho Power Co.*, *supra*.

In the *Pottsville case*, *supra*, the Commission had denied an application by Pottsville for a broadcasting station construction permit. The court of appeals reversed, holding that the Commission's decision was based upon an error of law, and remanded the case to the agency "for reconsideration in accordance with the views expressed" (309 U.S. at 139). On remand, the agency did not limit itself to reconsidering Pottsville's application, but consolidated it for comparative hearing with two others. The court of appeals then issued a writ of mandamus directing the Commission to reconsider Pottsville's application on the basis of the original record, but this Court reversed. It ruled (309 U.S. at 145) that "an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge"; that the "Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or neces-

sity' "; and that when the reviewing court had laid bare the agency's error of law, "the Commission was again charged with the duty of judging the application in the light of 'public convenience, interest, or necessity' ".

There is no valid reason—and petitioner points to none—why the *Pottsville* principle is not equally applicable to subsidy rate proceedings under the Federal Aviation Act. Indeed, both before and after *Pottsville*, the courts have held in rate proceedings that, upon judicial remand, the agency may consider the actual experience under the rate during the period of litigation.[4] Here, as in *Pottsville*, when the reviewing court laid bare the Board's error of law—its failure to limit subsidy to the need of the carrier as a whole—the Board on remand was "again charged with the duty" of limiting subsidy to such need. As the court below stated (Pet. 32), "[t]he Board, like the Federal Communications Commission, is required 'at all times' to gauge its actions by the public interest standard".

When the Board initially fixed the subsidy for international operations, it acted on the assumption that the future rate for the period 1950-1952 would produce a return of 10 percent on investment—the

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[4] *E.g.*, *United States* v. *Morgan*, 313 U.S. 409; *McCart* v. *Indianapolis Water Co.*, 302 U.S. 419; *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133; *Northern States Power Co.* v. *Public Utilities Commission*, 73 N.D. 211, 13 N.W. 2d 779; *Alabama Public Service Commission* v. *Southern Bell Telephone and Telegraph Co.*, 269 Ala. 361, 113 So. 2d 503; *Yonkers Railroad Co.* v. *Maltbie*, 251 App. Div. 204, 296 N.Y.S. 411.

amount which the Board found the carrier "needed" on such operations. When the matter was remanded to the Board in 1954, however, the Board had available the results of actual operations under that rate, which showed that under such rate the carrier received a return of 36 percent on its international investment, rather than the 10 percent that the Board previously had found it "needed". In these circumstances, we submit that the Board was fully justified in recalculating the amount of subsidy required for that period.[5] Otherwise the total subsidy awarded would have substantially exceeded the need of the carrier as a whole—by roughly $1,000,000—contrary to the rulings of the court below and of this Court that need is the ceiling on subsidy. To have ignored the actual operating results under the future rate for the period 1950 to 1952 would have contravened the settled rule that rates are not to be fixed on the basis of forecasts when the facts are actually known, since "[t]o prefer the forecast to the survey is an arbitrary judgment." *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 79, 82;

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[5] Petitioner contends (Pet. 21-21) that the court below should have remanded the case to the Board to enable the latter to determine, in its discretion rather than as a mandatory requirement, whether it should have made the redetermination. The short answer, as the court of appeals pointed out (Pet. 34, n. 12), is that even though the Board apparently believed it had no discretion not to make the redetermination, it further held that, if it had such discretion, a failure "to re-examine the rate level for the international division" would "exceed the bounds of sound discretion" (J.A. 59); see *supra*, p. 6).

Summerfield v. *Civil Aeronautics Board*, 207 F. 2d 200, 204, affirmed *sub nom. Western Air Lines* v. *Civil Aeronautics Board*, 347 U.S. 67.

2. The Board was also fully warranted in relying upon its prior determination that the carrier needed a subsidy return of only 7 percent for certain past periods. That determination was not challenged in the prior litigation, and in adhering to it the Board followed the recognized administrative practice of relying upon prior findings where no necessity is shown for their re-examination.[6] Contrary to petitioner's contention (Pet. 24-25), nothing in this Court's decision in *Delta Air Lines* v. *Summerfield*, 347 U.S. 74, indicates or even suggests that the Board was required to re-examine these findings anew. The *Delta* case held only that need is the ceiling on subsidy, and the Board complied with that standard when it awarded petitioner an amount that satisfied that need, namely, a subsidy return on international operations, after taxes, of 7 percent for part of the past period and 10 percent for the remainder.

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[6] "Due process does not afford a party the right to treat as a rehearsal a hearing on the issues for which the hearing was adequate." *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 228. See also, *Georgia Public Service Commission* v. *United States*, 283 U.S. 765; *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *Crichton* v. *United States*, 56 F. Supp. 876 (S.D. N.Y.), affirmed, 323 U.S. 684.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1960.

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